SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.
Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR APPELLANT STATE OF TEXAS

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INTRODUCTION

"Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way." *Martin v. Hunter's Lessee,* 1 Wheat. 304, 362 (1816) (Johnson, J. concurring).

The State of Texas does not disagree with the presentation of the appellant's position in the brief submitted on behalf of Maryland and the other appellants. There are however differences of emphasis and approach, and we believe we can be most helpful to the Court by this separate statement of our views. In order to avoid unduly burdening the Court, we do not duplicate the Statement of the Case nor the detailed analysis of the authorities made in the brief presented by Maryland and the other appellants, with all of which we fully agree.

QUESTION PRESENTED

Is the impact on interstate commerce of the wages and hours of employees of state schools and hospitals sufficiently substantial to permit Congress to regulate these wages and hours despite the damage thus done to the finances and sovereignty of the states?

SUMMARY OF ARGUMENT

1. Though the commerce power of Congress is very broad, this Court has always recognized that it is limited to "that commerce which concerns more states than one," and has held that local activities can be regulated only if the facts permit a rational conclusion that the local activity has a substantial and harmful effect on commerce among the several states. Undoubtedly the purchases in interstate commerce by state schools and hospitals have a close and intimate relation to such commerce, but the wages and hours of the employees of these state institutions have no impact, substantial or otherwise, on interstate commerce, and there are no facts in the legislative history or elsewhere that would justify a conclusion that they have such an impact.

2. To apply these wage and hour regulations to the state would have a devastating impact on the ability of the states to provide essential services and on their sovereign power to govern themselves. Even if some marginal relation to interstate commerce could be found, it should not be found where it would do violence to the presuppositions derived from the fact that we are a nation composed of states.

ARGUMENT

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required it to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. *McCulloch v. Maryland,* 4 Wheat. 316, 405 (1819).

The present case presents a question of just the sort foreseen by Chief Justice Marshall. How far does the commerce power of Congress extend, particularly when measured against the power of the states to govern themselves? This Court has had frequent occasion to address itself to aspects of this question, but it is unlikely, so long as it is a Constitution the Court is expounding, that it will ever be able to formulate a rule that will provide automatic answers to every case that may arise.

It is familiar history that from 1895 to 1936, in the line of cases extending from *United States v. E. C. Knight Co.,* 156 U.S. 1 (1895) to *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936), this Court—with only an occasional happy exception—took a very narrow view of the reach of the congressional power over commerce. We disclaim any reliance whatever on those cases. We accept fully the broad reading of the Commerce Clause put forward in *Gibbons v. Ogden,* 9 Wheat. 1 (1824), and in the cases since 1937 in which the Court has built on Marshall's vision. We believe that those cases teach

that the commerce power, though very broad, is not unlimited. We further believe that in § 102 of Public Law 89-601 Congress has gone beyond that limit.

The position of the United States, successfully advanced in the court below, is essentially the following:

(1) The power of Congress over commerce is very broad;

(2) The power where it exists is plenary;

(3) State instrumentalities are subject to regulation by Congress in the proper exercise of the commerce power;

Therefore, the statute here challenged is valid.

Texas has no quarrel with any of the premises stated. Each of them has impressive support in authoritative decisions of this Court. The difficulty, rather, is with the conclusion drawn from such premises. The conclusion follows only if it is demonstrated that the regulation here attempted is within the broad power over Congress. That, as we shall argue more fully, is a demonstration not yet made and that we think cannot be successfully made. We contend further that the extent of the commerce power and the fact that it is states that are to be regulated cannot profitably be viewed in isolation. In resolving a doubtful question of the reach of the commerce power, the fact that it is states that are to be regulated is itself a powerful reason to resolve the doubt against the validity of the regulation. "Federal legislation of this character cannot therefore be construed without regard to the implications of our dual government." *Kirschbaum v. Walling,* 316 U.S. 517, 520 (1942).

I. The Reach of the Commerce Power

The power of Congress in question here is the power granted in Article I, § 8, "To regulate Commerce * * * among the several States * * *." By an elaborate process of interpretation, requiring nearly 300 pages, Professor Crosskey is able to read the Commerce Clause to "include all the varieties of 'gainful activity' that Americans can carry on," and thus finds that it "means that Congress has a complete, not a fragmentary power 'to regulate Commerce.' " 1 Crosskey, *Politics and the Constitution in the History of the United States* 117 (1953). But, as he himself laments at length, *id.* at 17-49, that is not the understanding this Court has ever had of the power over commerce. It matters not how local the operation that applies the squeeze, but it must still be *interstate* commerce that feels the pinch if Congress is to have authority to act.

That there is a considerable difference between a power to regulate commerce and a power to regulate commerce "among the states" was clearly discerned by Chief Justice Marshall in *Gibbons v. Ogdens*

> It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal

> concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

9 Wheat. 1, 194-195 (1824).

At no time since 1824 has the Court ever departed from the notion that the commerce power is a limited power, and that there are commercial activities within the United States not encompassed within its scope. Within the bounds marked by the Constitution the power "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution," *id.* at 196, but this is true only so long as the congressional action is restricted to "that commerce which concerns more states than one." The Court has repeatedly noted the existence of such a limit, and the importance of maintaining the limit.

The first of the great modern cases interpreting the Commerce Clause is *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). "The authority of the federal government," the Court there declared, "may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Id.* at 30. The Court went on to pose the question as one of whether par-

ticular action "does affect commerce in such a close and intimate fashion as to be subject to federal control * * *." *Id* at 32.

Chief Justice Hughes stated a similar view, though in somewhat different terms, the following year in *Santa Cruz Fruit Packing Co. v. National Labor Relations Bord,* 303 U.S. 453, 466 (1938):

> It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still "commerce," and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of commerce, but the constitutional differentiation still obtains.

The constitutionality of the Fair Labor Standards Act as it then stood was the issue in *United States v. Darby,* 312 U.S. 100 (1941). The Court, in holding that Congress could validly regulate the wages and hours of those engaged in production of goods for interstate commerce, relied on the principle that the power over interstate commerce reaches "activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it." *Id* at 119-120. The test stated in *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942), was to the same effect.

The case of *Wickard v. Filburn,* 317 U.S. 111 (1942),

has been thought to extend congressional power over interstate commerce very far. In the court below Judge Winter referred to it as "the most extreme example of the reach of the commerce power of Congress to regulate local activity * * *." 269 F.Supp. at 832. The test was put in these words in that case:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

317 U.S. at 125. Justice Jackson, writing for the Court, then devoted four pages to an examination of the economics of the wheat industry in order to demonstrate that home-grown wheat competes with that moving in interstate commerce, and that consumption of home-grown wheat on many farms does have a substantial economic effect on interstate commerce. *Id,* at 125-129.

The same theme recurs in the Court's most recent expressions on this subject. In *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964), it is said that Congress may regulate "local activities in both the States of origin and destination which might have a substantial and harmful effect upon that commerce." The record of the passage of the 1964 Civil Rights Act was examined, and found to be "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce." *Id.* at 252. In the companion case of Ollie's Barbecue, the Court found "an impressive array of testimony that discrimination in restaurants had a direct and highly

restrictive effect upon interstate travel by Negroes." *Katzenbach v. McClung,* 379 U.S. 294, 300 (1964).

It can, of course, be said that each of the statements of the Court here noted is dictum. In each of the cases cited, the Court upheld the exercise of congressional power, and the result would not have been different if the power over commerce is unlimited, rather than subject to the restriction repeatedly insisted upon by the Court. But when the Court, throughout its whole history, has invariably been careful to describe the power over commerce in limited terms, it is fair to suppose that these are not mere casual expressions but that they represent a considered view that the power is so limited. "* * * [T]hough it is the fashion to insist that law is what courts do and not what they say, what they say has a considerable influence on what they do next. This is profoundly true of constitutional law. The impact of the concrete case is powerful not merely in securing a decision adapted to the needs of the immediate circumstances." Frankfurter, *The Commerce Clause* 26 (Mendelson ed. 1964).

This Court has the power to reject the limitation always recognized in the past, and to hold that the commerce power encompasses all the varieties of gainful activity that Americans can carry on. Unless the Court believes that Professor Crosskey's writing represents "the more recent research of a competent scholar, * * * which established that the construction given to it by the Court was erroneous," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 72 (1938), we may fairly expect the Court to adhere to the settled construction, and to hold that the activity here involved cannot be regulated by Con-

gress unless that activity has a substantial and harmful economic effect upon interstate commerce.

It may be argued that Congress has determined that there is such a substantial and harmful economic effect by the 1966 amendments that brought these employees under the Fair Labor Standards Act. Any action of Congress comes to this Court with impressive credentials of regularity, and a strong presumption of validity. This presumption, however, cannot be conclusive. To say that congressional action in this area is unreviewable would be to preserve the form of the limitation on the commerce power while destroying its substance. Congress would then be free to regulate any activity whatever so long as it invoked the words of the commerce power in the statute. The constitutional differentiation, "essential," as Chief Justice Hughes thought, "to the maintenance of our constitutional system," between activities within the reach of Congress and those without, would then turn on the whim of Congress. In the apt phrase of one of the opinions below, this would substitute congressional federalism for constitutional federalism. 269 F.Supp. at 853 (Northrop, J., dissenting). It implies no disrespect for Congress to suggest that it may occasionally err in its judgment of the extent of its power. The whole theory of judicial review, now, for good or ill, an integral part of our governmental system, assumes that Congress may err, and that this Court has the power and responsibility to act if it should err. The commerce power, like the other great powers allocated in the Constitution, "is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

Happily the most recent expression from this Court shows that it recognizes that the congressional determination is not controlling here.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964).

Congress has said, in § 3(r) of the Act, 29 U.S.C. § 203(r), that the activities of certain state employees "shall be deemed to be activities performed for a business purpose." In § 3(s) of the Act, 29 U.S.C. § 203(s) it has said that these state schools, hospitals, and related institutions, are "engaged in commerce or in the production of goods for commerce."* The fact that Congress has said this does not mean that it is so, and the Act can stand only if there are facts providing a rational basis for a determination by Congress that this regulation is necesary to the protection of commerce among the several states. If there is a factual basis for believing that the wage and hours of non-executive, non-professional, and non-administrative employees of public hospitals, schools, and related institutions have a substantial and harmful economic effect on interstate commerce, then Congress acted within its powers. But somewhere, either in the statute

*This is not true if the institutions for which the employees work are regarded as the "ultimate consumer" within § 3(i) of the Act, 29 U.S.C. § 203(i). The court below did not pass on that question. 269 F.Supp. at 831 n. 12.

itself or in its legislative history or in the record in this case or in facts that this Court may judicially notice, there must be a showing that these wages and hours do have such an effect.

The evil to which Congress addressed itself in 1938 in the original Act had an obvious and substantial harmful effect on commerce. If wages were lower and hours longer in State A than in State X, goods produced in State X would be at a price disadvantage in State A by comparison to the locally-produced goods; and interstate commerce would suffer. Perhaps even worse, goods produced in State A would have a price advantage in State X. These circumstances would discourage State X from adopting state wage-and-hours legislation, or from maintaining higher wage scales. Prior to the adoption of the Constitution a state could follow its own policies in these matters, and protect itself from destructive competition by less enlightened neighbors by imposing tariffs and other barriers to trade with other states. The Commerce Clause prevents the states from doing that. Thus, until Congress exercised its powers in 1938, the Commerce Clause was an instrument of destruction that could be and was used by those states in which substandard working conditions prevailed.

In the present instance, however, it is hard to see how the wages and hours of these state employees has any impact, much less a substantial and harmful impact, on interstate commerce. There are no findings in the 1966 statute describing the connection, and the skimpy legislative history of this portion of that statute is almost entirely silent.

In 1900 pages of hearings before the Senate commit-

tee, not a word can be found justifying extension of the Act to employees of state hospitals and schools. *Amendments to the Fair Labor Standards Act,* Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st and 2nd Sess. (1965-66). The committee reports, H. R. Rep. No. 1366, 89th Cong., 2d Sess. 16-17 (1966), and S. Rep. No. 1487, 89th Cong., 2d Sess. (1966), offer only this brief explanation:

> These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."

As is fully developed in the brief for Maryland and the other appellants, the facts, as stipulated in the court below, show without doubt that there is no competition between these state institutions and proprietary schools and hospitals. The states do not compete at all with proprietary institutions for hospital patients or school children. Thus they cannot compete unfairly, much less in commerce.

The rationale suggested in the committee reports was not relied on at all in any of the opinions in the court below. Judge Winter advanced two other bases on which he was able to find the requisite effect on interstate commerce. He showed first that the states, and local authorities, spend in excess of $42 billion per year on educational institutions and hospitals, and that a large proportion of the part of that sum allocated to

supplies and equipment is spent out of state. "Expenditures of this magnitude," he said, "are bound to have an enormous impact on interstate commerce." 269 F.Supp. at 833. This may be freely conceded. It may be conceded too that Congress is free to regulate such purchases as it may deem wise. The difficulty is making the leap from the admitted fact that these out-of-state purchases are "in" commerce to the conclusion that the wages and hours of the employees of these institutions therefore substantially affect commerce. There is a gap between premise and conclusion that no fact of which we have knowledge—or even any theory we are able to hypothesize—is able to fill. Judge Winter's later reliance on certain cases involving the Labor Relations Board, *id.* at 835-836, and his indication that the institutions would have no occasion to engage in commerce if the services of the employees here involved "were permanently withdrawn," *id.* at 836, does suggest one possibility. If the janitors, dishwashers, nurse's aids, and the like were all to leave these institutions because of dissatisfaction with their employment conditions, and the states were unable to obtain replacements, the states would have to close the institutions down and thereafter would not make purchases in interstate commerce to meet the needs of the institutions. Such an unfortunate contingency has not occurred in the past. The commitment of the states to perform these essential functions is such that it cannot be conceived that any state would allow it to occur in the future. Surely such a remote, speculative, and entirely unlikely possibility is not the "substantial impact" on commerce this Court has always said is needed.

The other connection Judge Winter found between

these state institutions and interstate commerce is that federal funds go to the institutions under a variety of programs, and thus there is "a regular interstate flow of funds." 269 F.Supp. at 834. Money can certainly be an article in commerce, and loan companies and the like operating across state lines are no less subject to regulation than businesses dealing in more tangible commodities. But to regard a grant from the federal government to a state or local school district as itself a transaction in or affecting interestate commerce is a novel concept, not supported in the decisions of this Court. We recognize that "it is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard v. Filburn,* 317 U.S. 111, 131 (1942). Virtually every federal statute authorizing grants to states or localities contains elaborate conditions to which the recipient agrees upon accepting the grant. Some power over labor standards, including wages and hours, is a commonplace in such statutes. E.g., 20 U.S.C. § 753 (higher education facilities); 23 U.S.C. § 113 (highways); 42 U.S.C. § 291e(a) (5) (hospitals); 42 U.S.C. § 2947 (economic opportunity programs). If the states do not wish to yield to such conditions, they have "the simple expedient of not yielding." *Massachusetts v. Mellon,* 262 U.S. 447, 482 (1923). It would be odd indeed if acceptance of funds granted by Congress under the spending power, on the conditions there specified, were to bring the states or their institutions under the commerce power, and authorize Congress to impose any additional regulations it might later deem desirable.

Judge Thomsen's opinion recognized that the court must examine "the effect which the action sought to be regulated has on interstate commerce," 269 F.Supp.

at 850, and noted the absence of congressional findings with respect to that relationship. *Ibid.* He left for another day consideration of "the effect, if any, which the State's overtime practices have on interstate commerce." 269 F.Supp. at 852. His opinion does not state what relationship he found between the wages of these employees and interstate commerce. Judge Northrop's dissent did not have to reach this issue.

There is one theory on which the wages—though probably not the hours—of state employees may be said to affect interstate commerce. If these employees are paid more, they will have more to spend. A portion of their expenditures will go for goods moving in interstate commerce and that commerce, and indeed the entire economy, will benefit thereby. If that theory is sound, the Commerce Clause empowers Congress to regulate the wages of every working person in the United States. Perhaps a hint of this is found in Judge Thomsen's reference to "the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage." 269 F.Supp. at 851. It is, of course, no argument against the existence of such a power that Congress has not sought to exercise it to its ultimate extent, but it does have significance that neither Congress nor any court has yet sought to justify minimum wage legislation on such an analysis. Nor did such an analysis occur to those who pressed for the 1966 amendments. The Secretary of Labor was asked before the Senate committee whether the Act would apply to truck drivers working intrastate. He answered that it would not, and on being asked for the reason, said: "If it is really intrastate commerce there is no constitutional authority." *Amendments to the*

Fair Labor Standards Act, Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess., pt. 1, at 86 (1965). Mr. Andrew J. Biemiller, Director of Legislation, AFL-CIO, lamented the fact that domestic workers are not given wage protection, but said "the issue is tied to the problem of Federal jurisdiction and a decent wage floor for them probably depends on State action." *Id.* at 95-96.

If Congress can provide a minimum wage for every employee in the United States on the theory that this will increase purchasing power and thus benefit interstate commerce, it is hard to think of any regulation that could not be equally plausibly justified, and we would be back, in effect, to Professor Crosskey's view of the commerce power.

We submit—as seriously and as responsibly and as respectfully as we are able—that the reason neither Congress nor the court below could point to any relation between the wages and hours of these state employees and commerce among the several states is because there is no such relation.

II. The Special Position of States

Even if, contrary to the conclusion we have just advanced, a sufficient relation could be found between the wages and hours of these employees and interstate commerce to turn the color of legal litmus paper, that would not be the end of the inquiry. The regulation here challenged is not of private citizens or businesses. Instead it goes to the states, constituent members of the federal union, and the special position of states under the Constitution must be taken into account in determining whether Congress has gone too far.

When states operate railroads or own wharves and piers, they are required to conform to the Federal Safety Appliance Act, *United States v. California,* 297 U.S. 175 (1936), the Shipping Act, *California v. United States,* 320 U.S. 577 (1944), the Railway Labor Act, *California v. Taylor,* 353 U.S. 553 (1957), and the Federal Employers Liability Act, *Parden v. Terminal Ry Co.,* 377 U.S. 184 (1964). Each of these statutes is at the heart of the commerce power. "Commerce, undoubtedly, is traffic * * *." *Gibbons v. Ogden,* 9 Wheat. 1, 189 (1824). Application of these general statutes to the states had no destructive effect on the states.

Here, on the other hand, is a statutory regulation that goes to the outermost limit—if not, as we think, clearly beyond—of the commerce power. In determining whether it is within or without the shadowy line at the periphery of congressional power, the fact that states are involved, and that its effect on the states would be very serious, are considerations this Court may properly take into account. All three of the judges below found that application of this statute to these state institutions "will necessiate either increased taxes or a curtailment of essential services." 269 F. Supp. at 845 (Winter, J.). See also *id.* at 850-851 (Thomsen, J.), and *id.* at 853 (Northrop, J.). Education and care of the sick are among the most important functions state and local governments perform. This Court has recognized that in terms with regard to education. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Any curtailment of these services would be a national tragedy. In many instances increased taxes is not a feasible alternative, even if Congress may properly compel such

tax increases, because of constitutional limits on tax rates.

The impact of this Act is not limited to the vital functions of education and care of the sick. The 1966 legislation strikes at the most important function of the states, that of governing their own affairs. Even the federal government, with its immense revenues, has recognized that there is not money enough for government to do everything it would like to do, and that it must choose how to allocate its resources. It must postpone or refrain from many desirable programs because other activities have a higher priority. The states and the school districts, with more limited revenue, must make even more difficult choices. To make these choices is the very essence of government. A state or a school district may think that its limited dollars are better spent in increasing the salary of its teachers rather than its janitors. Congress, by the 1966 legislation, has undertaken to deprive it of that choice, and to require that the pay of the janitors be increased, no matter what more urgent needs may beset the state.

This is not an argument against the wisdom of the 1966 legislation. Such an argument must be made in another place. It is an argument that Congress goes beyond constitutional bounds when it denies the states freedom to make their own assessment of the wisdom of a particular choice about the use of state funds.

As is recognized in all four of the opinions in *New York v. United States,* 326 U.S. 572 (1946), the states do enjoy a special status in our constitutional scheme, and there is a limit to the extent that powers that Congress may exercise to the fullest against private persons may be exercised against the states. "There are, of

course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. * * * These could not be included in any abstract category of taxpayers without taxing the State as a State." *Id.* at 582 (Frankfurter, J.). "All agree that not all of the former immunity is gone." *Id.* at 584 (Rutledge, J.). "* * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C. J.). "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *Id.* at 594 (Black, J.).

These expressions, and the line of cases they faithfully reflect, were thought not controlling below, on the theory that the tax power is limited and concurrent while the commerce power—and the war power—is concurrent. 269 F.Supp. at 845 (Winter, J.). *Id.* at 849 (Thomsen, J.).

It is quite true that the commerce power is plenary, to the extent that it exists, and that it "acknowledges no limitations, other than are prescribed in the constitution," *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1924), but in that very sentence Chief Justice Marshall said that these attributes of the commerce power were "like all others vested in Congress." *Ibid.* It has been recognized here over and over again that the power to tax, the first of the powers given Congress in Article I, § 8, is no second-class power. It has been declared to be "the strongest, the most pervading of all the powers

of government," *Loan Association v. Topeka,* 20 Wall. 655, 663 (1874), "absolute and unlimited," *Tanner v. Little,* 240 U.S. 369, 380 (1916), and a "plenary power." *Burnet v. Harmel,* 287 U.S. 103, 110 (1932). A more careful statement is that "the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument * * *." *McCray v. United States,* 195 U.S. 27, 59 (1904). Similar expressions appear throughout the United States Reports. E.g. *Hylton v. United States,* 3 Dall. 171, 174 (1796); *License Tax Cases,* 5 Wall. 462, 471 (1866); *Pacific Insurance Co. v. Soule,* 7 Wall. 433, 443 (1868); *Flint v. Stone Tracy Co.,* 220 U.S. 107, 153 (1910).

Whether it be the commerce power, the war power, or the tax power that is involved, Congress may not "do violence to the presuppositions derived from the fact that we are a Nation composed of States." *New York v. United States,* 326 U.S. 572, 576 (1946).

The impact of the wages and hours of the employees of state schools and hospitals on interstate commerce is, at most, minimal. The impact of the 1966 legislation of the ability of the states to provide essential services and upon their soverign power to govern themselves is obvious and drastic. The legislation is unconstitutional.

CONCLUSION

The judgment below should be reversed with directions to grant the relief prayed for in the complaint.

Respectfully submitted,

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